

No. 13-20-00287-CR

IN THE COURT OF APPEALS
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FOR THE STATE OF TEXAS KATHY S. MILLS
Clerk

THIRTEENTH JUDICIAL DISTRICT

Ex parte
Krisean Jamon Gibson (K.G.)

On Appeal from the 19th District Court
Of McLennan County, Texas
Trial Court No. 2020-555-C1A

BRIEF FOR APPELLANT
ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This is an appeal from a pretrial writ of habeas corpus seeking personal bond (CR 5).¹ Gibson was arrested for aggravated assault with a deadly weapon² on February 21, 2020 (2 RR 9). Both Gibson's application and hearing were filed and held in the middle of the COVID-19 pandemic on June 12, 2020 (2 RR 1). This case, and Gibson's other case involve similar appellate issues, but otherwise are regarding unrelated allegations (CR 21).

Gibson also has a pending felony motion to revoke probation. (CR 19.) He has been incarcerated while resolution of all three matters (*id.*).

The trial court denied relief and entered findings of fact and conclusions of law (2 RR 15; CR 66-70).

Gibson timely filed his notice of appeal (CR 73).

¹ This case overlaps with Case No. 13-20-00288-CR in that it is another application for writ of habeas corpus seeking personal bond for a separate, unrelated murder case was heard by the trial court in the same proceeding. TEX. PENAL CODE § 19.02. The trial court's findings of fact and conclusions of law joined both cases into one set (CR 66-70).

² See TEX. PENAL CODE § 22.02(a)(2).

REQUEST FOR ORAL ARGUMENT

Oral Argument before this Court is requested.

ISSUES PRESENTED

- I. Whether Executive Order GA-13, is unconstitutional.
- II. Whether the McLennan County Local Standing Order, which purports to suspend and extend Tex. Code Crim. Proc. 17.151 § 1(1) relating to the time period in which the State must be ready for trial before an accused is entitled to bond relief, is unconstitutional.
- III. Whether the trial court abused its discretion in denying Gibson a personal bond.

STATEMENT OF FACTS

On May 22, 2020, Gibson filed two applications for writs of habeas corpus seeking personal bond under Texas Code of Criminal procedure 17.151 (CR 5-59). This appeal relates to the application on the aggravated assault case (CR 5). Gibson sought this relief as the criminal justice system, and rest of the world, came to a standstill due to the COVID-19 pandemic (CR 5-6).

The Supreme Court of Texas and the Court of Criminal Appeals issued a series of emergency orders regarding procedures and deadlines during the COVID-19 pandemic.³ The courts did so after Governor Greg Abbott declared a state of disaster because of the pandemic.⁴ On March 29, 2020, Governor Abbott signed Executive Order GA-13 that suspends

³ Emergency Orders, “Current Emergency Orders Issue,” <https://www.txcourts.gov/court-coronavirus-information/emergency-orders/>

⁴ Proclamation, “Governor Abbott Declares State of Disaster in Texas Due to COVID-19,” (Mar. 13, 2020), <https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19>.

provisions of the Code of Criminal Procedure relating to personal bonds (CR 25-27).⁵

Gibson's application challenged the constitutionality of Executive Order GA-13 and the McLennan County Local Standing Order ("Local Standing Order") which were the bases on which the trial court denied relief (2 RR 10, 15; CR 5-15).

As to the instant application, Gibson argued that his confinement and restraint was illegal because the State failed to indict him within 90 days from the date of his detention (1A CR 5). The State asserted that the Local Standing Order gave the State 120 days to indict Gibson, and that GA-13 prohibited the trial court from granting relief due to the nature of the offense (2 RR 11). Following a hearing, on June 12, 2020, the trial court denied relief and agreed to making findings of fact and conclusions of law (2 RR 15; CR 66-70).

⁵ Executive Order GA-13 (Mar. 29, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-13_jails_and_bail_for_COVID-19_IMAGE_03-29-2020.pdf

The State proposed findings of fact and conclusions of law were adopted in full by the trial court (CR 66-70).⁶

As it relates to this case, the trial court found as follows:

1. Gibson was arrested on February 21, 2020.
2. His detention began on that date.
3. On March 23, 2020, the trial court entered a Local Standing Order applicable to all felony cases, extending the period in Tex. Code Crim. Proc. Art. 17.151 from 90 days to 120 days before a defendant would be eligible for bond relief under this article.
4. Governor Abbott issued an executive order on March 29, 2020 which suspended operation of Article 17.151 to prevent any person's automatic release on personal bond because the State is not ready for trial.
5. The same order also prohibits trial courts from releasing any person currently arrested for a crime that involves physical violence on personal bonds.

⁶ The findings of fact and conclusions of law were submitted in conjunction with findings on related 13-00288-CR (2020-555-C1B).

6. Gibson is detained on offenses that involve [allegations of] physical violence.
7. The Governor's order does not violate either the state or federal constitutions.

(CR 66-70)

The trial court certified Gibson's right to appeal (CR 76).

SUMMARY OF THE ARGUMENT

Gibson is unlawfully restrained in his liberty because the State was not ready for trial within 90 days from the date of his detention (CR 5). The trial court abused its discretion in denying Gibson the personal bond to which he was entitled.

The Texas Constitution and Disaster Act demarcate the Governor's authority during times of crisis. GA-13 disregards these limitations, suspending five substantive provisions of the Code of Criminal Procedure relating to personal bonds and other conditions of release. EO-GA-13 at 2-3. The provision relevant here is the suspension of Article 17.151, removing the only statutory limit on how long a person can be detained before the State is ready for trial (*id.*). This suspension applies to people arrested for any charge, with no caveat regarding violence or a history of violence. (*id.*).

Neither Executive Order GA-13 nor the Local Standing Order are constitutional, and therefore cannot justify Gibson's unlawful restraint. For these reasons, the trial court abused its discretion in denying Gibson a personal bond.

ARGUMENT & AUTHORITIES

In an April 2020 Memorandum, the United States Attorney General William Barr declared, “[T]he Constitution is not suspended in times of crisis.”⁷ Days later, the Supreme Court echoed this sentiment:

. . . when constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government. . . [and] [w]hen properly called upon, the judicial branch must not shrink from its duty to require . . . orders to comply with the Constitution and the law, no matter the circumstances.

See In re Salon a La Mode, 2020 WL 2125844 at *1 (Tex. May 5, 2020).

“The Constitution is not suspended when the government declares a state of disaster. Nor do constitutional limitations on the jurisdiction of courts cease to exist.” *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *1 (Tex. Apr. 23, 2020) (per curiam).

Preservation of Error

A defendant may use a pretrial application for writ of habeas corpus to challenge the denial of bail. *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex.

⁷ Memorandum, “Balancing Public Safety with Preservation of Civil Rights,” (April 27, 2020), <https://www.justice.gov/opa/page/file/1271456/download>

Crim. App. 2005). The trial court made findings of fact and conclusions of law and entered an order denying relief (CR 66-70).

For this reason, this Court has jurisdiction to hear this appeal and error is preserved for this Court's review. *Ex parte Young*, 257 S.W.3d 276, 277 (Tex. App. – Beaumont 2008, no pet.) ("No appeal lies from the refusal to issue a writ of habeas corpus unless the trial court rules on the merits of the application.").

Overview of Executive Order GA-13 and Local Standing Order

On March 29, 2019, the Governor of Texas issued Executive Order GA-13 (CR 57-59). That order suspends five articles of the Code of Criminal Procedure and two articles of the Government Code. The suspension relevant to the instant pleading mandates,

Article 17.03 of the Texas Code of Criminal Procedure, and all other relevant statutes and rules relating to personal bonds, are hereby suspended to the extent necessary to preclude the release on personal bond of any person previously convicted of a crime that involves physical violence or the threat of physical violence, or of any person currently arrested for such a crime that is supported by probable cause. I hereby order that no authority should release on personal bond any person previously convicted of a crime that involves physical violence or the threat

of physical violence, or any person currently arrested for such a crime that is supported by probable cause.

Article 17.151 of the Texas Code of Criminal Procedure is hereby suspended to the extent necessary to prevent any person's automatic release on personal bond because the State is not ready for trial.

The Governor of the State of Tex., Ex. Order GA 13, at 2 (Mar. 29, 2020) [“EO-GA-13”].

On March 23, 2020, both McLennan County felony district courts entered a joint order extending the current Article 17.151 Sec. 1(1) of the Texas Code of Criminal Procedure. The Order purports to suspend the current statute and change a defendant’s statutory entitlement to a personal bond from 90 days to 120 if the state is not ready for trial of the criminal action for which he is being detained.

. . . ORDERS AND EXTENDS Art. 17.151, Sec. 1(1), Texas Code of Criminal Procedure, from 90 days to 120 days from the commencement of his detention if defendant is accused of a felony.

Under normal circumstances, pursuant to Art. 17.151, Sec. 1 (1), Texas Code of Criminal Procedure, a defendant who is detained in jail pending trial of an accusation against such defendant must be released either on personal bond or by reducing the amount of bail required, if the State is not ready for

trial of the criminal action for which he is being detained within 90 days from the commencement of such defendant's detention if he is accused of a felony.

The Courts, finding extraordinary circumstances identified by the FIRST EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER, consistent with and under the authority of the FIRST EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER, pursuant to section 2(a) of said Order, HEREBY modifies the period of "90 days" to be " 120 days" from the commencement of such defendant's detention if such defendant is accused of a felony.

The Order does not expressly State the duration of its effect. The Order does state that it makes this Order to, “avoid risk to court staff, parties, attorneys, jurors and the public, and specifically the March and April 2020, grand jurors.” (CR 55.) It is signed by both McLennan County felony district court presiding judges (*id.*).

I. Executive Order GA-13 is unconstitutional.

GA-13 is unconstitutional in five ways. First, it violates due process of both state and federal constitutions. Second, it violates the bail provision of the same. Third, it violates the separation of powers provision of the Texas Constitution. Fourth, it unconstitutionally usurps the Legislature’s suspension of law power. Fifth, is unconstitutionally vague.

A. *Executive Order GA-13 violates due process guaranteed by both the federal and state constitutions.*

The Due Process Clause of the Fifth Amendment mandates that no one can be “deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. Similarly, the Due Course of Law Clause of the Texas Constitution establishes, “[n]o citizen of this State shall be deprived of . . . liberty . . . except by the due course of the law of the land.” TEX. CONST. art. I, § 19. These values are so fundamental that “[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 750, 755 (1987) (holding the “individual’s strong interest in [pretrial] liberty is ‘fundamental.’”). This norm reflects the longstanding principle that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)).

B. *Executive Order GA-13 violates the bail provisions of both the federal and state constitutions.*

The Eighth Amendment of the Federal Constitution mandates, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” As the Supreme Court recognized more than half a century ago, “federal law has unequivocally provided that a person arrested for a non-capital offense *shall be admitted to bail.*” *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (emphasis added).

Similarly, Article I, Section 11 of the Texas Constitution also dictates “[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident.” TEX. CONST. art. I, § 11. “The general rule favors the allowance of bail.” *Taylor v. State*, 667 S.W.2d 149, 151 (Tex. Crim. App. 1984). The Court of Criminal Appeals has called attempts to undermine the age-old right to bail “abhorrent to the American system of justice.” *Id.* at 152. “It is for this reason that the provisions contained in Article I, Section 11a of the Texas Bill of Rights ‘contain strict limitations and other safeguards’ to ensure that bail is not used as an instrument of oppression.” *Pharris v. State*, 165 S.W.3d 681, 689 (Tex. Crim. App. 2005).

Indeed, Executive Order GA-13 is “abhorrent” to the American and Texan system of justice. The constitutional requirements, as interpreted and applied by both the United States Supreme Court and the Texas Court of Criminal Appeals, are clear – the state cannot simply arrest a person and refuse to set bail. The Executive Order, however, directs judges not release entire groups of people on personal bond. This order directly contradicts the plain language of both the Federal and State Constitutions, as well as decades – if not centuries – of precedent.

C. Executive Order GA-13 violates the separation of powers provision of the Texas Constitution.

Article 2 of the Texas Constitution creates the legislative, executive, and judicial branches as three distinct entities in Texas. It also unequivocally establishes “no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others . . .” TEX. CONST. art. II.

In Chapter 17 of the Code of Criminal Procedure, the Texas Legislature crafted a series of requirements that members of the Judicial Branch must respect regarding the determination and imposition of bail.

The sixty-six articles in that chapter are instructions from the Legislative Branch to the Judicial Branch. The Executive Branch cannot via executive order interject itself into the scheme. And yet, through Executive Order GA-13, that is exactly what the Executive Branch has attempted. The Court cannot, however, give credence to this attempt. Directives given by the legislature on the judiciary continue until the judiciary finds those directives unconstitutional or until the legislature changes the directives itself. The Executive Branch has no authority over those legislatively crafted mandates.

Executive Order GA-13 seeks to find footing in the Government Code. The Order recites that Section 418.016(a) of that code permits the governor to “suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business . . . if strict compliance with the provisions would in any way prevent, hinder, or delay necessary action in coping with a disaster.” TEX. GOV’T CODE § 418.016(a). This reliance on Section 418.016(a) is unfounded, as it incorrectly assumes all laws are equal and that the governor is the supreme official over every one of them.

There are, in fact, multiple sources and types of law. Constitutional law, for example, comes from the Constitution; statutory law is handed down by the Legislative Branch; caselaw is crafted by the Judicial Branch; and regulatory law is created by the Executive Branch. Under the constitutional structure of Texas, if one branch finds a law crafted by another branch to be offensive, it can seek to change or abrogate that law (going through the procedures previously established and in place).

The *ad hoc* power contemplated by Executive Order GA-13 vesting the Executive Branch with absolute and unchecked power to suspend a law of the Legislative or Judicial Branch is repugnant to the Separation of Powers established 175 years ago in the Texas Constitution. *See* TEX. CONST. arts. I, § 28, II; *State v. Williams*, 938 S.W.2d 456, 462 (Tex. Crim. App. 1997) (noting the constitutional separation of powers provision “reflects a belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government”). A basic understanding of the different sources of law makes Section 418.016(a) clear. The section permits the

governor to suspend “any regulatory statute.” TEX. GOV’T CODE § 418.016(a). This statute gives the governor ultimate authority over *regulatory* statutes as the head of the Executive Branch. It does not give him unilateral power over *all* laws – simply those laws which his branch has implemented.

The problem, then, becomes clear: The Order attempts to suspend non-regulatory laws, i.e. articles of the Code of Criminal Procedure enacted by the Texas Legislature. The Executive Branch has tried to usurp the Legislative Branch’s authority. This action is barred by the Separation of Powers Clause of the Texas Constitution.

The Order interferes with not only the Legislative Branch but also the Judicial Branch. Discretion for release on bond is invested solely in the Judicial Branch. *See* TEX. CODE CRIM. PROC. ANN. art. 17.03 (“a magistrate may, in the magistrate’s discretion, release the defendant on personal bond without sureties or other security.”). The Executive Branch cannot attempt to claim power over a decision not within its purview. Executive Order GA-13 steps in front of the Judicial Branch, imposing blanket bond

determinations while simultaneously ordering the courts to ignore their legislatively imposed duty to make individual bond determinations. This action again violates the Separation of Powers Clause.

D. *Executive Order GA-13 unconstitutionally usurps the Legislature's suspension of law power.*

Only the Legislative Branch can suspend laws. TEX. CONST. art. I, § 28. (“No power of suspending laws in this State shall be exercised except by the Legislature.”). The State Constitutions of 1845, 1861, 1866, and 1869 actually permitted delegation of suspension authority. *McDonald v. Denton*, 63 Tex. Civ. App. 421, 426 (1910). The 1867 amendment, however repealed that authority. To this day, only the Legislature itself has the power to suspend laws.

Executive Order GA-13 suspends Articles 17.03, 17.151, 15.21 and 42.042 of the Code of Criminal Procedure “and all other relevant statutes and rules.” As discussed above, these provisions are not regulatory statutes but are rules of criminal procedure intended to effectuate the constitutional rights to bail and release by way of applications for writs of habeas corpus. Only the Legislature can suspend its own laws.

Insofar as Executive Order GA-13 relies on Section 418.016 of the Government Code as a delegation of this authority by the Legislature, such reliance would be misplaced. The Legislature cannot constitutionally delegate its suspension power. *Brown Cracker & Candy Co. v. Dallas*, 104 Tex. 290, 295, 137 S.W. 342, 343 (1911); *McDonald*, 63 Tex. Civ. App. at 426 (1910); *Burton v. Dupree*, 19 Tex. Civ. App. 275 (1898). To the extent the Legislature intended to delegate its suspension authority in Section 418.016, that attempt is also unconstitutional, as delegation of suspension power is strictly prohibited. *See* TEX. CONST. art. I, § 28.

Because the power to suspend laws resides exclusively with the Legislature and cannot be delegated, Executive Order GA-13 violates Article I, Section 28 of the Texas Constitution, and consequently is null and void.

E. *Executive Order GA-13 is unconstitutionally vague.*

Executive Order GA-13 seeks to refuse personal bonds to anyone previously convicted of, or who stands charged with, “a crime that involves physical violence or the threat of physical violence.” However, nowhere in the Order or any other Texas criminal statute is such a crime “of physical violence” defined. Pursuant to the Due Process Clause and the

Fifth Amendment to the United States Constitution and Article I, Section 10 of the Constitution of the State of Texas, any criminal statute or law “gives rise to the danger of arbitrary and discriminatory application” is void for vagueness.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. [Among them], if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). There is nothing in Executive Order GA-13 that gives a judge any direction or guidance in what is to be considered, “a crime that involves physical violence or the threat of physical violence.” Judges throughout the State of Texas may easily differ on what constitutes such a crime and thus Applicant, and all the citizens accused throughout the State who are being

held because of this vague directive, are subject to arbitrary and discriminatory application of the Governor's Executive Order. Without some delineation of what specific provisions of the Texas Penal Code would be considered under such a title, there is no way to ensure consistency in the application of the directive as to all citizens accused.

II. The McLennan County Local Standing Order, which purports to suspend and extend Tex. Code Crim. Proc. 17.151 § 1(1) during which the State must be ready for trial before an accused is entitled to bond relief, is unconstitutional.

For the same reasons discussed in Sections I (A), (C), (D), above, the local standing order is likewise unconstitutional. Gibson incorporates those arguments in this Section II by reference.

III. Because GA-13 and the local standing order are unconstitutional, the trial court abused its discretion in denying Gibson a personal bond the State was not ready for trial within 90 days.

Article 17.151 requires reduction of bail if the State is not ready for trial.

Specifically, Article 17.151, section 1(1) of the Code of Criminal Procedure provides in relevant part:

A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within . . . 90 days from the commencement of his detention if he is accused of a felony.

TEX. CODE CRIM. PROC. art. 17.151, § 1(1).

The presentment of an indictment within that 90-day period creates the groundwork for an assertion of readiness. *Ex parte Avila*, 201 S.W.3d 824, 826 (Tex. App. – Waco 2006, no pet.) (without indictment, State cannot announce ready). Here, and unlike Gibson’s murder case, there is no indictment, so the validity of a charging instrument is not even at issue.

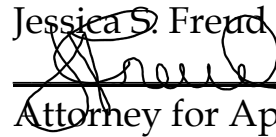
To the extent the trial court relied on GA-13 and the Local Standing Order, giving the State more than 90 days to be ready for trial, such action was based on unconstitutional orders. For these reasons, the trial court abused its discretion in denying Gibson the personal bond to which he is entitled.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Gibson prays this Court reverse the order of the trial court and grant Gibson the personal bond to which he is entitled.

Respectfully submitted,

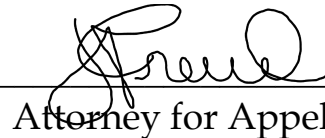
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Brief was emailed to Sterling.Harmon@co.mclennan.tx.us and/or Gabe.Price@co.mclennan.tx.us of the District Attorney's Office of McLennan County, Texas, on November 16, 2020.



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IN THE COURT OF APPEALS
THIRTEENTH JUDICIAL DISTRICT OF TEXAS
CORPUS CHRISTI, TEXAS

Ex parte

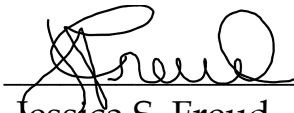
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No. 13-20-00287-CR

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), I hereby certify that the Appellant's Brief contains 4,540 words. The document was prepared using Microsoft Word, and the word count was generated using that program.



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